

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH-III

C.P. No. IB-564/(ND)/2019

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

**M/S INDIA FACTORING AND FINANCE SOLUTIONS PVT.
LTD.**

... FINANCIAL CREDITORS/PETITIONERS

VERSUS

M/S GLOBALITE INDUSTRIES PVT. LTD.

...CORPORATE DEBTOR/RESPONDENT

Coram:

**R.VARADHARAJAN,
Hon'ble Member (Judicial)**

**K.K. VOHRA
Hon'ble Member (Technical)**

Counsel for the Petitioner: MvKini Law Firm

Counsel for the Respondent: Alishan Naqvee, Swet Shikha

(Advocates)

ORDER

Date: 21.10.2019

1. The instant application has been filed by M/S India Factoring And Finance Solutions Pvt. Ltd. [for brevity 'the Applicant' or Financial Creditor (FC)] under the provisions of Section 7 of Insolvency and Bankruptcy Code, 2016 ("IBC") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiation of Corporate Insolvency Resolution Process (CIRP) of M/s Globalite Industries Pvt. Ltd. (for brevity Corporate Debtor or 'CD').

2. The transaction leading to filing of the present Application as reflected in the application is stated to be as under:

a) The FC vide facility letter dated 09.05.2017 bearing reference no. DEL_000307_1, extended trade finance facility to the tune of Rs. 4,00,00,000/- to M/s Globalite Retail Pvt. Ltd. (GRPL), Principal Borrower.

- b) There after a factoring agreement dated 12.05.2017 was executed between the FC and the Principal Borrower inter alia agreeing to the terms and conditions governing the aforesaid facility including timely payment of dues arising thereunder.
- c) The CD acted as guarantor for the said credit facility and a corporate guarantee dated 17.05.2017 was executed by the CD in favor of FC which in unequivocal terms stipulated the obligations of the CD herein.
- d) The said corporate guarantee is an unqualified, independent and irrevocable guarantee and as such the CD herein is under a legal obligation to abide by the terms of the guarantee.
- e) Upon default in payments made by the Principal borrower, a notice dated 31.08.2018 was issued by the FC to the Principal Borrower, exercising its right to recourse in terms of clause 12.1 of the factoring agreement and sought payment of its dues.
- f) On non- payment of amounts by the Principal Borrower, the petitioner invoked the guarantee and

issued a notice dated 21.01.2019 to the CD thereby calling upon the CD to make payments.

g) There after a reply notice dated 04.02.2019 was sent by the CD raising frivolous grounds thereby constituting vexatious litigation with the sole intention to harass the FC.

h) The total amount claimed to be in default by the CD is Rs. 2,63,65,768.13 as on 31.12.2018.

3. The following documents (copies) are attached to the application in order to prove the existence of financial debt:

- a. Duly accepted 'Facility letter' dated 9.05.2017 executed by the Respondent in favour of the Petitioner.
- b. Duly executed factoring agreement dated 12.05.2017 between the petitioner and Respondent.
- c. Corporate Guarantee dated 17.05.2017 executed between the Petitioner and Respondent.
- d. Funds in use Statement.
- e. Demand Notice dated 31.08.2018 along with the postal/ courier receipts along with tracking reports.
- f. Demand notice dated 21.01.2019.
- g. Reply Notice dated 21.01.2019.

4. The CD filed a reply on 10.06.2019 as follows:

- a. The FC has not mentioned about the tripartite arrangement between the FC and the third parties to the present proceedings i.e. GRPL, which is also the subsidiary of the CD and Flipkart India Private Limited.
- b. The interse transaction is disputed and is subject to a court proceeding in a civil suit bearing number CS/290/2019 filed by the GRPL and CD against the FC before Patiala House Court, Delhi.
- c. There is a premature invocation of 'Corporate Guarantee' furnished by the Respondent in terms of the Facility letter dated 9.05. 2017 executed between the FC and GRPL as also the factoring agreement dated 12.05.2017 entered into and executed between the FC and the GRPL for grant of finance facility amounting to Rs. 4,00,00,000/- and a debt approval letter dated 9.05.2017.
- d. The dispute that exists with regard to the principal amount is evident from the ledger account maintained by the FC as on 30.04.2019 showing the Principal

amount as disputed against all pending invoices for which a premature corporate guarantee has been invoked.

- e. That the FC is far from establishing its entitlement to receive any money from the subsidiary of the CD itself, and as such it would be grossly premature to hold the CD responsible towards a fall back corporate guarantee. Due to this the disputes pending between the subsidiary of the CD, FC and its approved Debtor/ Flipkart, it is likely that GRPL (subsidiary of the CD) is determined to have no liability towards the FC or the Approved Debtor of the FC.
- f. The CD referring to the judgement titled Export Import Bank of India vs. CHL Limited states that the liability of a guarantor arises only when the Principal borrower defaults in repayment of the demand made by the lender, which situation has not arisen in the present case.
- g. The Cd has also annexed an Email dated 1.05.2019 from the FC to GRPL along with the ledger showing the pending invoices as disputed as on 30.04.2019.

5. A rejoinder was filed by the FC on 22.07.2019 stating,

- a) That in the matters in respect of which the power has been conferred on this Hon'ble Tribunal, the jurisdiction of the civil court is completely barred. The civil suit instituted by GRPL before Patiala house court is barred by Section 430 of the Companies Act 2013, thus the said suit is non maintainable.
- b) The FC further states that it extended finance facilities from time to time to the Principal Borrower on the invoices raised by the Principal Borrower on their debtor i.e. Flipkart, against which the facilities were extended. The funds disbursed have been depicted in the Funds in Use statement from the period 09.05.2017 to 31.01.2019. The repayment of the aforesaid facility was getting defaulted which compelled the FC to issue Demand Notice dated 31.08.2018 to the Principal borrower, whereby the right of recourse under clause 12 of the factoring agreement was exercised.
- c) The Principal borrower defaulted in repayment of dues even after exercise of recourse. Thus, due to protracted

default FC invoked the said corporate guarantee of the CD. Therefore, the contention that the present petition is premised on premature invocation of corporate guarantee is false and denied.

- d) That the present petition was filed on 20.02.2019 and the notice was issued to the CD vide order dated 08.03.2019. The civil suit however was filed by the CD on 28.03.2019 to escape the liability under the present proceedings.
- e) Section 128 of the Indian Contract Act 1882 states that the liability of the guarantor is co-extensive with the liability of the principal debtor and can be invoked without exhausting the remedies against the principal debtor.
- f) The factoring agreement executed between the parties had a provision for 'right to recourse' which was executed by the GRPL after duly analyzing the terms of the agreement and the eventualities arising thereof, wherein in case of any default arising in terms of repayment the client i.e. GRPL was to compensate/

repay the amount due in order to minimize the risk of loss of the FC.

- g) The clause 12 of the factoring agreement dated 12.05.2017 stipulates that the FC shall have the right to recourse against the GRPL in respect of each receivable remaining unpaid after the recourse date and the FC shall at any time on demand be entitled to recover the amount prepaid against the receivables.
- h) After exercising recourse if the principal borrower I.e. GRPL fails to repay the due amount under the factoring agreement, the corporate guarantee shall be liable to repay the said amount as per the terms of the corporate guarantee dated 17.05.2017.
- i) The FC further adds that the CD has clearly admitted the dues and liabilities and has nowhere in their pleadings or in arguments at all, disputed or denied such claims.
- j) Thus, it is an admitted position that the debt is due and payable, and the CD is clearly liable to pay the same.

6. Learned Counsel for the applicant has rightly argued that all requirements of Section 7 of IBC for initiation of CIRP by a FC stand fulfilled. In that regard, he has submitted that the application is complete as per the requirements of Section 7 (2) of IBC and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is overwhelming evidence to prove default and the defense which has been taken by the CD is rather evasive in nature. It is pertinent to mention that the CD as such in his pleadings has nowhere disputed or denied the claims made by the FC. Also taking into consideration Section 128 of the Indian Contract Act, the liability of the guarantor is co-extensive with the liability of the principal debtor and the same can be invoked without exhausting the remedies against the Principal Debtor.

7. The Applicant has specified the name of the Resolution Professional (IRP) and has annexed Form 2, the consent of the proposed IRP to the application accordingly.

8. From the Application filed it is seen that the Applicant has named an IRP in Part III of its Application whose details are as follow:

Mr K.V. Sivaraman, Address: AAA Insolvency Professionals LLP, E-10A, Kailash Colony, New Delhi- 110048.

It is also seen from the Application that the above named IRP has given a written consent in Form 2 wherein he has agreed to accept appointment as an IRP if Application is admitted. Further, it is also evident from the said Form 2 as filed by the IRP signed under his hand that he is not a related party to the CD and that he is eligible to be appointed as an independent director on the Board of the CD. Certificate of registration of the IRP as issued by the Insolvency and Bankruptcy Board of India (IBBI) and self-attested has also been enclosed along with the Application by the proposed IRP and taking into consideration all the above, this Tribunal finds that this is a fit case to be admitted in terms of Section 7 of IBC and thereby initiate CIRP as against the CD with the following consequences:

- a. Mr K.V. Sivaraman, having Registration number: IBBI/IPA-001/IP-P00900/2017-2018/11497 is appointed as the IRP and he shall strictly act in accordance with the provisions of IBC and the attendant Rules enjoined upon him;

b. In terms of Section 14, as reproduced hereunder, the CD shall be under moratorium on the following terms:

(a) the institution of suits or continuation of pending suits or proceedings against the CD including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the CD any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the CD in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the CD.

c. However during the pendency of the moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the CD as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

d. The duration of the period of moratorium shall be as provided in Section 14(4) of IBC, 2016 and for ready reference reproduced as follows:-

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process: Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of CD under section 33, the moratorium shall cease to have effect from the date of such

approval or liquidation order, as the case may be.

- e. The Board of Directors of the CD shall stand suspended on and from this day as envisaged under Section 17 of the Code.
- f. In terms of Section 7(7)(a) of IBC the registry of this Tribunal is directed to communicate the order to both the FC and the CD at the earliest. In addition a copy of the order shall also be forwarded to IBBI for its records. Further the IRP above named be also furnished with copy of this order forthwith by the Registry.

With the above directions, the application stands disposed of.

- Sol -

(K.K. VOHRA)

MEMBER (TECHNICAL)

- Sol -

(R.VARADHARAJAN)

MEMBER (JUDICIAL)